

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2058

To be submitted

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2058

JAMES ROLLINS,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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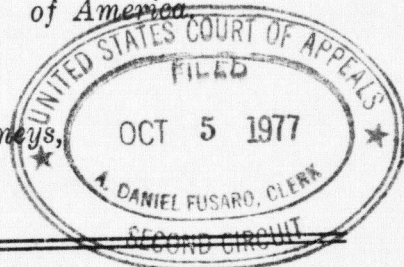


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Preliminary Statement

James Rollins appeals from the denial, on April 12, 1977, by the Honorable John M. Cannella, United States District Judge, of his petition for habeas corpus relief pursuant to Title 28, United States Code, § 2255. Rollins claims that the District Court used an improper standard in denying his petition.

Proceedings Below

On December 11, 1974, in the Southern District of New York, a judgment of conviction was entered against James Henry Rollins who had been found guilty after a three day trial before Judge Cannella and a jury. Rollins was convicted on the first two counts of a four count Indictment (S 74 Cr. 951) charging him with aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341

and 2 (Counts One and Two), using a false name to promote mail fraud in violation of 18 U.S.C. § 1342 (Count Three) and entering a bank with intent to commit larceny in violation of 18 U.S.C. § 2113(a) (Count Four).*

Judge Cannella sentenced Rollins to 3½ years in prison and fined him \$2,000. This sentence was later amended to run concurrently with a state sentence. Rollins is currently serving his federal and state sentences at Missouri State Prison.

Rollins' conviction was affirmed on appeal and the Supreme Court denied certiorari.**

On August 16, 1976 Rollins filed the instant motion. It was denied by Judge Cannella in a written Memorandum Decision on April 12, 1977. This appeal followed.

A. Statement of Facts

The facts as established at trial revealed that Rollins attempted to defraud a New York bank of over \$650,000 by causing forged payment orders to be sent to the bank.***

* After the jury returned guilty verdicts on Counts One and Two the Government consented to a mistrial on Count Three and it was later dismissed with the Government's consent. Judge Cannella dismissed Count Four on the ground that 18 U.S.C. § 2113(a) was not intended to encompass entry into a bank to commit mail fraud.

** *United States v. Rollins*, 522 F.2d 160 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976).

*** We have reproduced here, in pertinent part, the statement of facts set forth in Judge Hays' opinion upon the direct appeal, *United States v. Rollins*, supra, 522 F.2d at 161-163 (2d Cir. 1975). For a more complete statement of the case, along with the underlying transcript citations, the Court is respectfully referred to the Statement of Facts at pp. 2-9 of the Government's brief in the direct appeal which is also part of the record in this appeal.

On August 10, 1973, Rollins, claiming to be "Robert Cody," opened a checking account in the name of "Kodi's Domestic and International Enterprises" at a branch of Manufacturers Hanover Trust Company in New York City. In late August or early September, 1974 the bank received two mail transfer forms from Nairobi, Kenya which purported to be directions from the Kenyatta Avenue branch of the Standard Bank, Ltd., in Nairobi, Kenya to the branch of Manufacturers Hanover instructing it to deposit \$301,097.48 and \$352,165.03, respectively, into the account of "Kodi's Domestic and International Enterprises." Both transfer forms listed as drawer the "Wheat Marketing Branch." There was no such entity listed in the Kenya Post Office Directory.

Upon receiving the first transfer form on September 3, 1974 a bank official called the mailer listed on the "Kodi's" account application. The person who answered the phone said he was Robert Cody and was expecting a large sum of money arising from wheat transactions in Kenya. The next day a call was made to Kenya from the number listed to Cody.

Cody called the bank daily for the next three days inquiring as to when the funds would be available. In the meantime, United States Postal Inspectors were contacted and a Postal Inspector arranged to be at the bank when Cody came to pick up the money. On the day he was told the funds would be ready, Cody went to the bank and confirmed that he was there to pick up money forwarded from Kenya in connection with the sale of wheat. Rollins was thereupon arrested.

At the time of his arrest Rollins had in his possession an address book which contained a listing for a Mr. Zini, in Nairobi, Kenya. The address and telephone number listed in fact belonged to a Mr. Ooko who had been discharged in 1973 from the same branch of the Kenya

bank which purportedly had sent the transfer forms. At the time of arraignment Rollins instructed his wife to advise "Zini" of what had happened.

At trial, in order to further establish that Rollins participated with Ooko in the scheme, the Government also introduced two passports with Rollins' photograph. One passport was issued to Rollins, the other to "Lynwood Joseph Evans" and it had stamps which indicated the bearer had been in Kenya in 1971. The passports had been seized from Rollins' apartment during the execution of a search warrant issued in connection with a California murder.* Rollins' pre-trial motion for suppression of the passports on the grounds that the affidavit in support of the warrant did not contain probable cause was denied.

B. The Direct Appeal

In his direct appeal Rollins claimed it was error to admit the passports into evidence. He contended that the warrant was issued without probable cause. This Court squarely rejected Rollins' argument that the information supplied by the informant which formed the basis of the warrant application did not meet the test of reliability established in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). The Court held that because the informant was an eyewitness the requirement of past reliability required for professional informants did not apply and, in any case, even if the requirement did apply here, the informant's reliability had been shown by the independent corroboration of the information he provided. *United States v. Rollins, supra*, 522 F.2d at 164-165.

* It was at his trial in California for murder, for which he was convicted, that Rollins claims to have obtained the information which forms the basis of his present petition.

Rollins also claimed that the seizure of the passports had been beyond the scope of the warrant. This Court held the claim had been waived by failure to raise it prior to trial and in any case the seizure was justified under the plain view doctrine. In holding that Rollins had waived this claim, the Court said that if a hearing had been held and the Government had lost:

"the Government would have had the opportunity to alter its conduct of the case, and refrain from relying on the passports. While the passports seized in California were useful in establishing Rollins' identity and contacts in Kenya, it seems entirely probable that the Government could have secured a conviction without the challenged evidence. . . ." 522 F.2d at 166.*

C. The Present Motion

In his petition for a writ of habeas corpus Rollins once again argued on the basis of "newly discovered evidence" that the passports were introduced against him in error as they were the product of a search made without probable cause. (App. 17).** Rollins set forth four bases for his claim: (1) In the affidavit for the search warrant the affiant made "false misrepresentation" (sic) of facts given to him by the informant; (2) the affiant intentionally withheld material facts from the magistrate who issued the warrant; (3) the evidence seized was outside the scope of the warrant; and (4) the informa-

* While Rollins made numerous other claims on appeal from his conviction, they are not relevant to the facts of the instant appeal. It should also be noted that in his unsuccessful application to the United States Supreme Court for a writ of certiorari Rollins again made the claim that the search warrant had been issued without probable cause.

** "App." refers to Rollins' appendix.

tion relied on to establish probable cause was stale. (App. 17).

D. The District Court's Opinion

In a Memorandum Decision filed April 12, 1977 Judge Cannella denied Rollins' petition. In its decision the District Court stated that it would assume the truth of Rollins' claim that the affidavit in support of the warrant contained false representations and omissions that were sufficient to negate probable cause and that this information was neither discovered nor discoverable by Rollins until his subsequent trial in California. (App. 3, 4). Nevertheless the court denied Rollins' claim because "the exclusion of the passports probably would *not* have produced a different verdict." (App. 5).

Judge Cannella disposed of Rollins' other claims in a footnote. He held that the claim that the seizure of this passport exceeded the scope of the warrant had already been considered on appeal and rejected. *United States v. Rollins, supra*, 522 F.2d at 165-66. The Court refused to allow the matter to be relitigated collaterally. Judge Cannella also characterized as patently frivolous the claim that the information used to establish probable cause for the issuance of the warrant was stale. (App. 8).

ARGUMENT

The District Court Properly Denied Rollins' Petition for a Writ of Habeas Corpus.

In his habeas corpus petition, Rollins claimed that constitutional error was committed at his trial when the trial court admitted into evidence the two passports seized pursuant to a California search warrant. Judge Cannella denied the writ, without a hearing, on the ground that exclusion of this evidence would not have changed the verdict. Rollins' sole claim on appeal is that the District Court incorrectly used the standard applicable to new trial motions and that a petition for a writ of habeas corpus cannot be denied on the ground that evidence sought to be excluded did not affect the verdict. Contrary to Rollins' claim, Judge Cannella applied an appropriate standard and correctly decided to deny this petition without a hearing.

Rollins' appellate brief incorrectly assumes that a constitutional attack on any evidence at his trial automatically entitled him to a hearing on his petition for a writ of habeas corpus. In fact, in the context of a petition for habeas corpus raising a constitutional claim, the District Court may determine that the admission of the challenged evidence was harmless error. *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970); *United States ex rel. Pella v. Reid*, 527 F.2d 380, 386 (2d Cir. 1975) (Judge Oakes concurring); *Parker v. Swenson*, 459 F.2d 164 (8th Cir.), cert. denied, 409 U.S. 1126 (1972); *United States ex rel. Drenzo v. Yeager*, 443 F.2d 228, 231 (3d Cir. 1971); *Myricks v. United States*, 434 F.2d 629 (6th Cir. 1970); or that newly discovered evidence could not have affected the verdict. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *United States v. Natelli*, 553 F.2d 5 (2d Cir. 1977); *Brach v. United States*, 542 F.2d 4 (2d Cir. 1976). Since the admission of constitutionally

infirm evidence may constitute harmless error upon a direct appeal, see, e.g., *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1076-77 (2d Cir. 1977), upon the more limited review available under § 2255, the District Court may certainly dismiss a petition on the ground that at most it raises a claim that could not have affected the verdict.

Judge Cannella's finding that the exclusion of the passports would not have affected the verdict was clearly correct. The District Court opinion amply demonstrates this:

In addition to the passports there was substantial evidence upon which the jury could have found Rollins guilty of the crimes charged. The passports were not the only evidence connecting the defendant to Kenya. Firstly, a personal address book seized from Rollins at the time of his arrest contained a reference to a post office box for a "Mr. Zini," which actually was rented by Walter Donald Abado Ooko, a former employee of the Kenya bank from which the forged payment orders purported to originate. Nor did Rollins deny his involvement with people in Kenya. When questioned by Manufacturers about the orders, he stated that they concerned the shipment of wheat to Kenya.

Although the passports, which indicated that Rollins had traveled to Kenya under an assumed name, tended to show that his trip was not for legitimate purposes, there was other evidence to negate Rollins' defense that he was ignorant of the forgeries. The reference to "Mr. Zini" in Rollins' address book was particularly damaging in that the nature of the forgeries was such that the forger or someone participating with him would have had to have had access to certain

records at the Kenya bank. Additionally, Rollins' explanation to Manufacturers, that the money was in payment for a shipment of wheat to the Kenyan "Wheat Marketing Board," tended to incriminate him since there was no entity with this title in Kenya at the time in question.

Admittedly, evidence of an assumed name is generally prejudicial to a defendant. Here, however, the passports merely showed that the defendant had not one, but two aliases. In his dealings with the bank in New York the defendant identified himself as Robert Cody, and he continued to do so through the trial. (App. 4-5).

Although Judge Cannella assumed the truth of Rollins' allegations for purposes of deciding the petition, even assuming their truth, Rollins failed to state sufficient grounds for attacking the search warrant used in the seizure of the passports. Rollins presented conclusory allegations to support his contention that the affidavit in support of the warrant contained intentional misrepresentations. The only basis for the claim was an alleged inconsistency between the affidavit in support of the warrant and a statement taken from the witness by an officer other than the one who swore to the affidavit. It is difficult to see how the affiant can be accused of intentional misrepresentations on the basis of a claimed inconsistency in a statement taken by a different officer. Moreover, the alleged inconsistency—namely that the witness saw the defendant running "out the driveway" rather than "from the office" does not on the face of it undermine the probable cause established by the affidavit.*

* Rollins' other claims attacking the warrant are utterly frivolous. Judge Cannella succinctly disposed of them as follows:

"Rollins also alleges that the passports seized were outside the scope of the warrant and that the information

[Footnote continued on following page]

In sum, the District Court properly determined that the Rollins' petition should be denied without a hearing.

CONCLUSION

The denial of the petition for a writ of habeas corpus should be affirmed.

Respectfully submitted,

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relied upon to establish probable cause for the warrant was stale. The claim that the passport seizure exceeded the scope of the warrant was passed on by the Second Circuit and rejected. This matter therefore cannot be relitigated collaterally. *E.g., United States v. Natelli*, No. 76-1494 (2d Cir. March 28, 1977). That the information relied upon to establish probable cause for the issuance of the warrant was stale, is patently frivolous. The crime that formed the basis of the warrant occurred one day before the warrant's issuance." (App. 7, fn. 2).

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HENRY H. KORN being duly sworn deposes
and says that he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the *5th* day of *October, 1977*
he served ~~a copy~~ ^{two copies} of the within brief by placing the same in a
properly postpaid franked envelope addressed:

JAMES ROLLINS
Box 539
JEFFERSON CITY, MO.

and deponent further says that he sealed the said envelope and
placed the same in the mail box for mailing at the United States
Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Henry H. Korn

sworn to before me this

5th day of *October, 1977*

Phyllis C. Rush

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4635198
Qualified in Bronx County
Commission Expires March 30, 1978